

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

) MDL 1566
) 2:03-CV-01431-PMP-PAL
) BASE FILE

ARANDELL CORP., et al.,
Plaintiffs,

) 2:07-CV-01019-PMP-PAL

v.

XCEL ENERGY, INC., et al.,
Defendants.

) ORDER RE: PLAINTIFFS' MOTION
) TO RECONSIDER (Doc. #1644)

Presently before this Court is Plaintiffs' Motion for Reconsideration of the Court's February 26, 2009 Dismissal of CMS Energy Corp. and CMS Energy Resources Management Co. for Lack of Personal Jurisdiction (Doc. #1644) with supporting declaration (Doc. #1645). Defendants filed an Opposition (Doc. #1660) on June 15, 2009. Plaintiffs filed a Reply (Doc. #1696) on July 13, 2009.

I. BACKGROUND

The parties are familiar with the factual background of this action as part of this Multidistrict Litigation ("MDL"), and the Court will not repeat the facts here except where necessary. Defendants CMS Energy Corporation ("CMS"), CMS Energy Resources Management Co. ("MST"), and Cantera Gas Company previously moved to dismiss, arguing this Court lacks personal jurisdiction over them. According to these Defendants, they conduct no business in Wisconsin and have no other contacts supporting general or

1 specific jurisdiction. Defendant CMS also argued it cannot be subject to jurisdiction in
2 Wisconsin based on its subsidiaries' contacts with the forum because its subsidiaries are not
3 its agents or alter egos, and Wisconsin would not support the conspiracy theory of
4 jurisdiction.

5 Plaintiffs responded that CMS's subsidiaries have conducted business in
6 Wisconsin by making sales of natural gas to Wisconsin-based entities with knowledge that
7 the natural gas would be consumed in Wisconsin. Additionally, Plaintiffs argued CMS is
8 subject to personal jurisdiction through its subsidiaries' contacts based on agency and alter
9 ego principles. Plaintiffs further argued that because Wisconsin's antitrust statutes
10 contemplate imposing liability on an antitrust conspirator who performs acts outside of
11 Wisconsin that have an impact in Wisconsin, the Court has personal jurisdiction over
12 Defendants under Wisconsin's long-arm statute.

13 This Court held Plaintiffs had not established a prima facie case that MST was
14 subject to personal jurisdiction in Wisconsin. (Order (Doc. #1528).) The evidence
15 presented showed MST entered into long term supply contracts with several Wisconsin-
16 based entities worth millions of dollars in sales and MST employees regularly solicited
17 business from Wisconsin companies at their Wisconsin offices, either in person or by
18 telephone. (Id. at 21.) The Court stated that "[h]aving specifically targeted Wisconsin for
19 sales, and having been successful in that effort, MST purposefully directed activity at
20 Wisconsin." (Id.) However, the Court concluded that Plaintiffs had not demonstrated their
21 claims arose out of MST's forum-related contacts because Plaintiffs presented no evidence
22 MST solicited and made sales to any of the named Plaintiffs. (Id. at 22.) The Court noted
23 that the named class representatives' claims must satisfy the specific jurisdiction test, and
24 because no class has been certified, Plaintiffs could not rely upon the possibility that
25 unnamed class members' claims may arise out of MST's Wisconsin contacts. (Id.) The
26 Court therefore granted MST's motion to dismiss for lack of personal jurisdiction. (Id.)

1 As to Defendant CMS, Plaintiffs asserted personal jurisdiction in Wisconsin over
2 CMS based solely on its subsidiaries' contacts with the forum. Because the Court held that
3 neither MST nor Field Services were subject to personal jurisdiction in Wisconsin, the
4 Court also dismissed CMS for lack of personal jurisdiction. (Id. at 23.) The Court further
5 held that, consistent with several other of this Court's orders regarding CMS's amenability
6 to personal jurisdiction, the Court would not attribute MST's or Field Services' contacts to
7 CMS under agency or alter ego principles, or under the conspiracy theory of personal
8 jurisdiction. (Id.)

9 Plaintiffs now move the Court to reconsider this ruling. Plaintiffs contend that
10 newly discovered evidence establishes that MST in fact made sales to a named Plaintiff in
11 this action through an agent, Kaztex Energy Management ("Kaztex"). Plaintiffs also argue
12 this Court incorrectly applied the personal jurisdiction test by applying the "but for" test in
13 deciding whether Plaintiffs' claims arose from Defendants' forum-related activities.

14 Defendants respond that the Kaztex information is not "new," as Plaintiffs knew Kaztex
15 purchased natural gas from MST for delivery points outside of Wisconsin and cited to such
16 evidence in their opposition to MST's motion to dismiss. Defendants further contend the
17 Court did not err in its analysis of the personal jurisdiction question. Finally, Defendants
18 argue that the time has expired for Plaintiffs to request reconsideration of any purported
19 legal error.

20 **II. DISCUSSION**

21 Reconsideration of a prior ruling is appropriate only in limited circumstances,
22 such as the discovery of new evidence, an intervening change in controlling law, or where
23 the initial decision was clearly erroneous or manifestly unjust. Nunes v. Ashcroft, 375 F.3d
24 805, 807-08 (9th Cir. 2004). A motion for reconsideration is not an avenue to re-litigate the
25 same issues and arguments upon which the court already has ruled. Brogdon v. Nat'l
26 Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000).

1 **A. Timeliness**

2 Defendants argue Plaintiffs' motion for reconsideration is untimely because it
3 was not brought under Federal Rule of Civil Procedure 59 within ten days of the Court's
4 Order, and was not brought under Rule 60 before the time to appeal lapsed. Plaintiffs
5 respond that Rule 59 only applies to judgments, and this Court did not enter judgment as to
6 these Defendants. Plaintiffs also argue the time to appeal the Order has not lapsed because
7 Rule 54 provides that where the Court does not completely dispose of the case as to all
8 claims and all parties, all orders remain subject to revision.

9 At the time this Court entered its Order, Federal Rule of Civil Procedure 59(e)
10 required a party moving to alter or amend a judgment to file such a motion within ten days
11 after judgment was entered.¹ A motion for relief from a final judgment, order, or
12 proceeding under Rule 60(b) "must be made within a reasonable time." Fed. R. Civ. P.
13 60(c). Generally, however, the party must move for relief from a legal error under Rule
14 60(b) before the time for appeal expires. See Gila River Ranch, Inc. v. U.S., 368 F.2d 354,
15 357 (9th Cir. 1966). Pursuant to Rule 54(b), "any order or other decision, however
16 designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer
17 than all the parties does not end the action as to any of the claims or parties and may be
18 revised at any time before the entry of a judgment adjudicating all the claims and all the
19 parties' rights and liabilities." The Court may direct entry of judgment when resolving
20 fewer than all claims or all parties, but only if it expressly determines there is no just reason
21 for delay. Fed. R. Civ. P. 54(b).

22 Rule 59(e) is inapplicable here, as the Court did not enter judgment with respect
23 to Defendants CMS or MST, it dismissed for lack of personal jurisdiction. Additionally,
24

25 ¹ By amendment, Rule 59(e) now provides that a motion to alter or amend judgment must be
26 filed within twenty-eight days after entry of judgment.

1 Plaintiffs' motion is timely under Rule 60(b) because the time for appeal has not expired.
2 The Court's prior Order resolved Plaintiffs' claims as to fewer than all of the parties in the
3 action, and the Court did not enter judgment under Rule 54(b). Plaintiffs' motion therefore
4 is timely.

5 **B. Merits**

6 A nonresident defendant's contacts with the forum state may permit the exercise
7 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
8 the forum or purposefully availed himself of the privileges of conducting activities within
9 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
10 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
11 Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155-56 (9th Cir. 2006). The plaintiff "bears
12 the burden of demonstrating that the court has jurisdiction over the defendant." Id. at 1154.

13 The Court will grant Plaintiffs' motion for reconsideration as to Defendant MST.
14 Plaintiffs have presented new evidence demonstrating that MST made sales to Plaintiffs'
15 agent, Kaztex, during the relevant time period. Although Plaintiffs previously argued MST
16 had made sales to Kaztex, Plaintiffs did not present evidence demonstrating that fact
17 sufficient to make out a prima facie case of personal jurisdiction. Plaintiffs' prior evidence
18 consisted of a sales record that purported to show sales from MST to Kaztex. (Ex. F to
19 Decl. of Alexander T. Pendleton (Doc. #1049) at CMS-WI-022754.) However, the
20 document was less than clear on its face, and was contradicted by other evidence which did
21 not list MST as an entity from which Kaztex purchased natural gas as agent for Plaintiff
22 Arandell Corporation. (See id.; Decl. of David C. Treis (Doc. #744) at 2.) Kaztex since has
23 corrected its list and now indicates that it purchased natural gas from MST during the
24 relevant time period. (Decl. of William E. Fischer (Doc. #1645), Ex. A at 5 & Attach A.)
25 Plaintiff Arandell Corporation's claims arise out of Defendant MST's forum-related
26 contacts, as Plaintiffs have presented evidence that Plaintiff Arandell Corporation would

1 not have been harmed but for Defendant MST's sales to its agent at prices which Plaintiffs
 2 allege were manipulated through MST's participation in a price-fixing conspiracy.

3 Because the Court previously ruled that Plaintiffs failed to establish MST's
 4 forum-related contacts were the "but for" cause of Plaintiffs' injuries, the Court never
 5 reached the third prong of the specific jurisdiction test, whether the exercise of jurisdiction
 6 over the defendant is reasonable. If, as here, the plaintiff establishes both purposeful
 7 availment and "but for" causation, "the defendant must come forward with a 'compelling
 8 case' that the exercise of jurisdiction would not be reasonable." Boschetto v. Hansing, 539
 9 F.3d 1011, 1016 (9th Cir. 2008) (quotation omitted). Under this last prong of the specific
 10 jurisdiction test, courts generally consider a variety of factors to determine whether
 11 exercising jurisdiction would be reasonable:

12 (1) the extent of the defendant's purposeful interjection into the forum
 13 state, (2) the burden on the defendant in defending in the forum, (3) the
 14 extent of the conflict with the sovereignty of the defendant's state, (4)
 15 the forum state's interest in adjudicating the dispute, (5) the most
 efficient judicial resolution of the controversy, (6) the importance of
 the forum to the plaintiff's interest in convenient and effective relief,
 and (7) the existence of an alternative forum.

16 Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000),
 17 modified, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199,
 18 1207 (9th Cir. 2006). A court must balance all seven factors and no factor is determinative.
 19 Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993).

20 MST has not set forth a compelling case that the exercise of personal jurisdiction
 21 over it in Wisconsin would be unreasonable. As discussed in this Court's prior Order, MST
 22 purposefully injected itself into Wisconsin by entering into long term supply contracts with
 23 several Wisconsin-based entities from which MST reaped millions of dollars in sales. MST
 24 identified Wisconsin as a target for natural gas sales with reference to specific customers.
 25 Plaintiffs presented un rebutted evidence that two MST employees who had sales
 26 responsibility for Wisconsin regularly solicited business from Wisconsin companies at their

1 Wisconsin offices, either in person or by telephone.

2 The burden on MST of litigating this action in Wisconsin is minimal. MST is a
3 Michigan corporation, and thus geographically is near Wisconsin. Moreover, modern
4 technology and ease of travel lessen the burden. There is no conflict with the sovereignty of
5 Michigan. Wisconsin, on the other hand, has a significant interest in ensuring its citizens
6 are protected from collusive price-fixing behavior, and in providing its citizens with a
7 forum in which to seek redress. Resolution in Wisconsin is efficient, as the claim can be
8 adjudicated with many of MST's alleged co-conspirators who remain Defendants in this
9 action. Because Wisconsin courts will be more familiar with the Wisconsin law under
10 which Plaintiffs bring their claims, Plaintiffs' interest in convenient and effective relief is
11 served by Wisconsin exercising jurisdiction over MST. Finally, while an alternative forum
12 exists in Michigan, that factor alone does not outweigh the other factors which weigh in
13 favor of finding the exercise of personal jurisdiction over MST reasonable. Having directed
14 sales efforts at Wisconsin and being successful in those efforts by making millions of
15 dollars worth of sales, MST reasonably could foresee being haled into Wisconsin courts by
16 one of its Wisconsin-based customers for an alleged price-fixing conspiracy arising out of
17 those sales. Plaintiffs therefore have presented evidence sufficient to support a prima facie
18 case that this Court has personal jurisdiction over Defendant MST.

19 However, the Court will deny Plaintiffs' motion for reconsideration as to
20 Defendant CMS. This Court set out in detail in separate Orders why it would not attribute
21 MST's forum-related contacts to CMS. (See Orders (Doc. #1515, #1517, #1518, #1520).)
22 Plaintiffs' motion for reconsideration on this issue is a rehashing of arguments and issues
23 the Court already has considered and decided. Plaintiffs' attempt to compare a statement in
24 CMS's risk management policy with the evidence which this Court found sufficient to
25 exercise personal jurisdiction over Dynegy, Inc. ("Dynegy") is unpersuasive. CMS's risk
26 management policy identifies MST as the entity within CMS that is "authorized to negotiate

1 for and enter into derivative agreements on behalf of CMS Energy.” (App. of Docs. Filed
2 Under Seal (Doc. #1142), Ex. M at 2.) Plaintiffs liken this statement to a statement in
3 Dynegey’s 1998 Policy and the 2002 Policy Statements which stated Dynegey’s board of
4 directors granted authorization to traders to negotiate, enter into, and execute natural gas
5 sales and purchases on Dynegey’s behalf. (Order (Doc. #1549) at 17-18.) However, the
6 Court did not rely on a single statement in a Dynegey policy. The Court noted that the 1998
7 Policy contained a “‘Trader Authorization Form’ which stated that the individual trader ‘has
8 been authorized to act as a trader on behalf of Dynegey, Inc., subject to all limitations and
9 qualifications’ set forth in the 1998 Policy.” (Id.) The Court also noted that Dynegey sent a
10 letter to a Wisconsin-based entity on Dynegey’s own letterhead to confirm that Dynegey made
11 sales to that entity in Wisconsin. (Id.) Plaintiffs have presented no similar evidence as to
12 CMS.

13 **C. Transfer**

14 Plaintiffs request that if the Court determines it lacks personal jurisdiction, it
15 should transfer the claims against Defendants to a district where jurisdiction would exist.
16 Defendants respond that the Court lacks the power to transfer the case anywhere except
17 back to the originating court. Defendants also argue transfer after the Court already has
18 dismissed is inappropriate. Finally, Defendants contend transfer is not in the interests of
19 justice because Plaintiffs have advocated against an alternative forum.

20 Whenever a court “finds there is a want of jurisdiction” in a civil action, the court
21 “shall” transfer the action to “any other such court in which the action or appeal could have
22 been brought at the time it was filed or noticed,” but only if the transfer is “in the interest of
23 justice.” 28 U.S.C. § 1631. The United States Court of Appeals for the Ninth Circuit has
24 not decided whether the term “jurisdiction” in § 1631 includes personal jurisdiction, or
25 relates only to subject matter jurisdiction. The statute’s plain language does not limit its
26 scope to only subject matter jurisdiction. The Court therefore concludes that it includes

1 cases where there is a want of personal jurisdiction. See Roman v. Ashcroft, 340 F.3d 314,
2 328 (6th Cir. 2003). Moreover, the Ninth Circuit has held that 28 U.S.C. § 1406(a)²
3 “authorize[s] the transfer of a case so as to cure the lack of personal jurisdiction in the
4 district where the case was first brought” if the transfer is in the interest of justice. Wood v.
5 Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983).
6 Consequently, this Court typically would have had to consider whether transfer was in the
7 interest of justice prior to dismissing Defendants for lack of personal jurisdiction in this
8 action, even without a request from Plaintiffs for a transfer. In re McCauley, 814 F.2d
9 1350, 1352 (9th Cir. 1987) (“A motion to transfer is unnecessary because of the mandatory
10 cast of section 1631’s instructions.”).

11 However, this Court is not the originating court for this action, as the case is
12 among several actions consolidated for pretrial proceedings before this Court after transfer
13 from the Judicial Panel on Multidistrict Litigation. Pursuant to 28 U.S.C. § 1407(a), actions
14 transferred to a court for consolidated or coordinated pretrial proceedings “shall be
15 remanded by the panel at or before the conclusion of such pretrial proceedings to the district
16 from which it was transferred unless it shall have been previously terminated.” The United
17 States Supreme Court has interpreted this language to prohibit the MDL court from
18 transferring the MDL cases to itself for trial under 28 U.S.C. § 1404(a), which involves
19 transfer for convenience of the parties and witnesses. Lexecon Inc. v. Milberg Weiss
20 Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998). The Supreme Court did not consider
21 whether an MDL court could transfer MDL actions under either § 1406(a) or § 1613. The
22 Ninth Circuit has not considered the question after Lexecon.

23
24 ² Section § 1406(a) provides:

25 The district court of a district in which is filed a case laying venue in the wrong division
26 or district shall dismiss, or if it be in the interest of justice, transfer such case to any
district or division in which it could have been brought.

1 Faced with § 1407(a)'s mandate that this Court remand MDL cases to the
 2 originating court on the one hand, and § 1613's and § 1406(a)'s mandates that the Court
 3 transfer the actions if in the interests of justice on the other, the Court concludes that
 4 § 1407(a) precludes a transfer under § 1613 or § 1406(a) absent a waiver of § 1407(a) by
 5 the plaintiff. The Supreme Court described § 1407(a) as an "unconditional command" and
 6 an "obligation impervious to judicial discretion." Lexecon, 523 U.S. at 35, 36, 42. In
 7 contrast, although cast in mandatory terms, whether to transfer in the interest of justice
 8 under § 1631 or § 1406(a) ultimately lies within the Court's discretion. Preminger v.
 9 Principi, 422 F.3d 815, 822 (9th Cir. 2005) (reviewing transfer under § 1631 for abuse of
 10 discretion); King v. Russell, 963 F.3d 1301, 1304 (9th Cir. 1992) (same for § 1406(a)).
 11 Consequently, § 1407(a)'s command trumps discretionary transfers under § 1613 or
 12 § 1406(a).

13 However, after Lexecon, some courts have concluded that a plaintiff may waive
 14 the right to a § 1407(a) remand. See Armstrong v. LaSalle Bank Nat'l Ass'n, 552 F.3d 613,
 15 615-16 (7th Cir. 2009); In re African-American Slave Descendants Litig., 471 F.3d 754,
 16 756 (7th Cir. 2006); In re Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1325-26
 17 (11th Cir. 2000). Lexecon made clear that § 1407(a) is "a venue statute that . . .
 18 categorically limits the authority of courts (and special panels) to override a plaintiff's
 19 choice [of forum]." 523 U.S. at 42. Objections to venue generally are waivable. In re
 20 Duncan, 713 F.2d 538, 542 (9th Cir. 1983).

21 Consequently, the Court did not err by dismissing Defendant CMS without
 22 considering transfer because, absent a waiver from Plaintiffs,³ § 1407(a) precluded a
 23


24 ³ One might think a plaintiff always would prefer transfer to dismissal, and thus requiring a
 25 waiver in these circumstances is a formality which serves no legitimate purpose and harms, rather than
 26 protects, a plaintiff's interests. However, a plaintiff may make the strategic decision that an appeal of
 the district court's jurisdiction or venue ruling is preferable to a transfer to another forum.

1 transfer under either § 1613 or § 1406(a). Plaintiffs never requested a transfer or even
2 suggested the possibility of a transfer until this motion for reconsideration, and instead
3 insisted on their original choice of forum. Now that the Court has dismissed Defendant
4 CMS, the option to transfer no longer is available. See HollyAnne Corp. v. TFT, Inc., 199
5 F.3d 1304, 1307 (Fed. Cir. 1999) (holding district court lacks authority to transfer case after
6 it has dismissed for lack of personal jurisdiction).

7 **III. CONCLUSION**

8 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Reconsideration of
9 the Court's February 26, 2009 Dismissal of CMS Energy Corp. and CMS Energy Resources
10 Management Co. for Lack of Personal Jurisdiction (Doc. #1644) is hereby GRANTED in
11 part and DENIED in part. The motion is granted with respect to Defendant CMS Energy
12 Resources Management Co. Defendant CMS Energy Resources Management Co. is hereby
13 reinstated as a Defendant in this action. The motion is denied with respect to Defendant
14 CMS Energy Corp.

15
16 DATED: June 4, 2010

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19 PHILIP M. PRO
20 United States District Judge
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